(4)

No. 04-356

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OSCAR W. EGERVARY,

Petitioner,

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS FREDERICK P. ROONEY AND JAMES J. BURKE

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COUNTERSTATEMENT OF FACTS

A. The enlistment of Mr. Rooney to assist in the return of the abducted child, and the Hungarian court order and other materials supplied to him by the State Department.

In May 1994, the Department of State contacted Frederick P. Rooney, a solo practitioner in Bethlehem, Pennsylvania, and asked him to become involved, *pro bono publico*, in this international child abduction matter concerning the young Oscar Jonathan Egervary. [D-11, C.A. APP. 512 - C.A. APP. 513]. At the time, Mr. Rooney had some limited experience in domestic child abduction matters through work as an attorney with Legal Services in Lehigh County, Pennsylvania. Of the cases he had handled that required him to venture beyond the Lehigh Valley area, one concerned an abduction of a child to Tennessee; another, to Puerto Rico. [*Id.*] A year before the call from the State Department, Mr. Rooney had pursued an interest in the subject of international child abduction by attending a conference/seminar in Washington, D.C. sponsored by the United States Justice Department, State Department and the American Bar Association. The conference provided participants with information and materials including model pleadings under the Hague Convention on the Civil Aspects of International Child Abduction ("ICARA"). Following the conference, he agreed to put his name on a list of those willing to assist in such matters. [C.A. APP. 514].

The Hague Convention to which both the United States and Hungary are "Contracting States," calls for each to "designate a Central Authority" to discharge certain imposed duties. Hague Convention, Article 6; 42 U.S.C. § 11606. The Department of State serves that function in the United States.

22 C.F.R. § 94.2. The broad obligations of Central Authorities are described in Article 7 of the Convention and include "either directly or through any intermediary . . . tak[ing] all appropriate measures" to locate and prevent further harm to a "wrongfully removed" child and among other things, to "initiate or facilitate the institute of judicial proceedings" to return the child, to "provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisors" and provide necessary "administrative arrangements . . . to secure the safe return of the child. . . ." Hague Convention, Article 7; 22 C.F.R. § 94.6. [D-9] The State Department is prohibited, by regulation, from directly acting "as an agent or attorney" in proceedings under the Convention. 22 C.F.R. § 94.4(a). [D-10].

In the May 1994 call to Mr. Rooney, Virginia Young from the State Department told him that the department had been contacted by the Hungarian Central Authority, informing the department that a child had been located in Monroe County and that "they were looking for somebody to assist in the return of the child to Hungary." [C.A. APP. 524]. Ms. Young provided Mr. Rooney with copies of orders and other documents from the Hungarian authorities, and through a series of phone calls and faxes, assisted him in preparing documents for filing an ICARA petition. [C.A. APP. 525]. The documents from Hungary Mr. Rooney relied upon included a letter from Ms. Young giving the background of the case, the "Hague application" of Ms. Kovacs, a translated Hungarian court order, and a letter from the Hungarian Ministry of Justice. The letter of Ms. Young informed Mr. Rooney that the child involved was almost two-years old, and:

> . . . according to the information we have, was quite brutally kidnapped by his father and brought

> to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.
>
> The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up [his] job and belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary has been established as the place of residence when the father did the kidnapping . . .

[D-11, D-12].

The December 22, 1993 Hungarian court order included in the materials—in translation—stated that the child Oscar Jonathan Egervary had been placed in the custody of Ms. Kovacs "by a temporary measure" and directed the return of the child by Mr. Egervary "within 3 days." The order referred to an earlier-filed petition of Ms. Kovacs to dissolve the marriage, and stated as grounds for the December 22, 1993 order that the couple "broke off their married life in the summer of 1993" and, the court order continued:

> since that time the child has been living under the custody of mother. Respondent [Mr. Egervary] threatened, several times, to take along the child abroad. . . . On December 18, 1993, respondent took away the child, by force, and took him along with him, and since that time he has [not] made

> any appearance. Petitioner has no knowledge of the whereabouts of the child. Petitioner submitted application for a temporary measure in which she requested to place the child with her. The application of petitioner is well-grounded. By the statement of her father and by the report made to the police, petitioner rendered it probable that respondent took along the child by force. . . .[1]

[C.A. APP. 581-83].

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1. Mr. Egervary, when deposed, confirmed that the child was born in the United States on July 4, 1992 and lived in the United States for approximately 8 months, and approximately 10 months in Hungary before December 18, 1993. He also testified that when he moved with his wife to Hungary in 1993, they transported their belongings, including furniture and his car, that he took a job there as an English teacher in a music school where he worked from August until November 1993. The couple separated on September 1, 1993.

He also testified about the abduction saying that on December 19, 1993 he located his wife at the home of her parents, that this was her registered address as confirmed by the police, that he talked to her in an attempt to get her to return with him and with Oscar J. to the United States, but the attempt failed. He testified that he was then "playing" with the child and while holding him, Mr. Egervary's brother "got out of his car and approached us", he then testified as to the events that followed:

> Q. Which brother is this?
>
> A. George. And when my wife saw him she got very nervous and she said out loud, what do you guys want to do? Or something like that.
>
> Q. And then what happened?
>
> A. Then I had Oscar in my arms and I walked to my brother's car and I sat in the back seat with Oscar.

(Cont'd)

Mr. Rooney testified that he relied on this information, supplied by the State Department, in preparing the ICARA petition, including the statement that the child's "habitual residence" had been Hungary before being abducted by Mr. Egervary, that the child had been "wrongfully removed," that a Hungarian court had awarded custody to Ms. Kovacs, and that an appeal of that order had been taken by Mr. Egervary. Mr. Rooney testified that at the time he brought the petition to the district court, he had checked to see whether Mr. Egervary had made any claim of custody in Monroe County, finding none, he also confirmed that Mr. Egervary had not contacted the State Department concerning a claim of custody. [C.A. APP. 531-32; C.A. APP. 545-46]. Mr. Rooney testified about his understanding of the custody

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(Cont'd)

Q. And what did your wife do?

A. She was screaming that they are kidnapping my son. Help. She was yelling for help.

Q. And what happened?

A. My brother sat in the driver's seat and start [sic] to drive away.

Q. What did your wife do?

A. Screaming and kind of jumped on the car, or tried to jump on the car.

Q. Do you recall your brother jamming on his brakes and reversing the car to knock your wife off the hood of the car?

A. Yes.

Q. Did he knock her off the hood of the car?

A. It wasn't a knock. She slid off.

[C.A. APP. 276-77].

issue at the time he presented the ICARA petition to the district court:

> the issue of custody was, had already been determined, at least temporarily, in Hungary and that Hungary was the jurisdiction that the issue of custody would need to continue to be litigated.
>
> [and this exchange followed]:
>
> Q. At the time that you were in court on May 13, 1994, did you know whether Mr. Egervary had ever been given any sort of notice of the orders entered in Hungary regarding temporary custody?
>
> A. I didn't, but I did know that he had been represented somehow in an appeal that was taken.
>
> Q. So you did not know whether he received notice of the orders that were taken; correct?
>
> A. I didn't know if he did, but I knew that somebody acting on his behalf had because he had an attorney representing him on the appeal of the December 23rd [1993] order.

[C.A. APP. 545-46 (pp. 145-46)].

B. Mr. Rooney's preparation of the petition, and presentation to District Judge Nealon.

The "model pleadings" which Mr. Rooney relied upon in representing Mrs. Egervary contained three options for effecting the return of the child, all suggesting an *ex parte* proceeding without notice to the "alleged parent-kidnapper followed by seizure of the child and a prompt post-deprivation hearing with notice." [D-13]. The first option ordered the child to be delivered to the court, or if no judge is available, to a juvenile shelter. The second option called for the child's delivery to a juvenile shelter "where he shall remain in custody until a [prompt] hearing is scheduled." The third option permitted release of the child to "petitioner or her agent" and called for the court to thereafter hold a hearing. [H-2; C.A. APP. 586]. Mr. Rooney drafted a fourth option to the petition, permitting delivery of the child to "Petitioner's agent for immediate return to the physical custody of Petitioner." [H-3; D-14 – D-15]. Mr. Rooney had added this provision with the understanding that it was appropriate under the circumstances suggested in the Hungarian court documents (as confirmed by information he received from the State Department) concerning a previous award of custody to Ms. Kovacs as well as the forceful seizure of the child from her and the divorce proceedings in Hungary. [C.A. APP. 536].

After drafting the petition, Mr. Rooney, accompanied by Mr. Burke, filed the petition in the Middle District and shortly afterwards met with Judge Nealon, who had been assigned the petition. Mr. Rooney recalled telling the judge how he became involved in the matter and when asked about his experience with ICARA cases, "I told him that I was more involved in domestic cases, but that I had been learning

about the Hague Convention and he was interested. . . ." Mr. Rooney testified about his understanding of the authority for the fourth option and presenting it to Judge Nealon:

> And the question of the return came about because in my opinion there had already been two hearings . . . in Hungary and since Hungary was a signatory to the Hague Convention, that order of the Hungarian courts deserved full faith and credit. I had been involved in domestic cases where the courts simply gave full faith and credit to a foreign order from another state and allowed for a child to be returned.

[C.A. APP. 540]. According to Rooney, Judge Nealon "was specifically concerned about whether he had the authority to allow the child to be returned." In order "to assure the judge that, in fact, my interpretation of his authority was correct, [Rooney] called Schuler [of the State Department] from [the judge's] chambers" during a break in meeting with the judge occasioned by an intervening conference. [D-16]. On further questioning at deposition, Mr. Rooney testified about Judge Nealon's concerns:

> Q: . . . What reservations did the judge express?
>
> A: I think he questioned whether or not he had the authority to order the return of the child, and I said all I could tell him is that in my experience in foreign jurisdictions, and I mean domestic foreign, not Pennsylvania, that under the UCCJA that with a certified copy of a court order that you could go from Pennsylvania to retrieve children in California with a certified Pennsylvania court

> order without having to invoke the whole process of hearings in California.

[D-15]. Mr. Rooney testified about the phone call he then made to the State Department, speaking to Mr. Schuler . . .

> I called Schuler from the Judge's chambers and I said, Jim, Judge Nealon appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority and Schuler said to me he's the judge. He's got the authority to make whatever decision he wants.

[D-16]. Mr. Rooney also testified that he discussed the other options requested in the petition with Judge Nealon:

> Q: And what was discussed during that second meeting in chambers with the judge?
>
> A: We talked about alternatives that he had under the order that I had presented, and that in instances children are taken into protective custody and that the child could have been held by social services in Monroe County. I don't remember what else could have been done right now, but that he could have gone into a juvenile shelter, that he could have been taken into protective custody.
>
> Q: And you described those alternatives to the judge?
>
> A: Correct.
>
> Q: And then what was said?

> A: Well, I remember the judge mentioning, it was Friday and it may have been difficult to get protective services in at that time, given the time of day or the fact that it was a Friday. That I remember. And I told him that I didn't know anyone else in the area. I didn't know if there was any other family members with whom the child could be left, and that given those circumstances, whatever his decision was I would abide by it and respect it, but I told him if the child, if he ordered the return of the child, that I would take the child to Hungary.

[D-17 – D-18].

Judge Nealon was deposed in the case and as the District Court (Judge O'Neill) summarized Judge Nealon's testimony:

> Judge Nealon's testimony agrees with much of Rooney's testimony, but it differs on a few key points. According to Judge Nealon, Rooney: 1) portrayed himself as representing the State Department;[2] 2) stated that he was seeking to have the Judge enforce a Hungarian court order; 3) had already made arrangements to return the child to Hungary that day; and 4) never suggested any remedy that would require Judge Nealon to conduct a hearing on the matter. . . .

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2. Judge Nealon testified: "Well, in capsulizing what he told me and I have to use the word advisedly whether he said he was retained, I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition. . . ." [C.A. APP. 96]

The district court also quoted this passage from Judge Nealon's deposition:

> A: And let me — I know the petition mentions hearings, but at no time did he suggest a hearing to me. I want to be empathic [sic] about that. That this — that while hearings may have been required in a normal kidnapping context, here was a court order out of Hungary and that he had been retained by the State Department to implement this and pick up this child and have her [sic] returned to Hungary. It was an interpretation of international law. And I remember being concerned about it and saying that I want to find out if this is the official State Department position. I don't have experience in these matters and I'm willing to take their representation if they say that no hearing is required, no notice is required, and that the child should be immediately picked up and turned over to Mr. Rooney for prompt return to Hungary.

[D-20].

The same day, Judge Nealon entered an order selecting the fourth option of relief and the order was enforced by the U.S. Marshals and Pennsylvania State Police. The child, Oscar J. Egervary, was delivered to Mr. Rooney who, after making arrangements with his office for a flight to Europe, promptly returned the child to the mother. Oscar W. Egervary thereafter obtained counsel and filed a motion for reconsideration of Judge Nealon's May 13, 1994 order. The motion for reconsideration was docketed on May 27, 1994, and the matter was briefed and scheduled for argument and argued on July 25, 1994. Briefs on additional issues were

requested by the court and were filed on August 2, 1994. After initially ordering a hearing for August 8, on August 11, 1994 Judge Nealon ordered the hearing indefinitely continued, apparently to allow for discussions between Mr. Egervary and Ms. Kovac about resolving custody.

Mr. Egervary's counsel's letter to Judge Nealon of December 19, 1994 advised the court that his client was participating in custody hearings in Hungary, with the result that "the proceedings before your honor may be rendered moot by the proceedings in Hungary." Mr. Egervary requested that the matter before Judge Nealon be placed in suspense:

> I recommend, and respectfully request, that your Honor place this action in the civil suspense docket until such time as the parties can better ascertain whether the Hungarian action is likely to be resolved in a timely fashion. If the Hungarian action continues to drag on without a discernible endpoint after several months, then I will contact Your Honor and request that this matter be returned to the active docket so that we may proceed with a hearing.

[C.A. APP. 347]. The letter requested the alternative relief of grant of the motion for reconsideration and order of the "immediate return of the child." [*Id.*]. The Hungarian courts ultimately awarded custody to Ms. Kovacs in May 1996. The complaint in this matter was filed in April 1996

C. Counterstatement of the Proceedings.

1. The District Court's decision and issues raised by Respondents, including the insulating effect of Judge Nealon's discretionary, independent decision.

Egervary's petition before this Court asserts that the Court of Appeals determined, "without benefit of consideration or analysis of the issue by the trial court," that the "'independent'" decision of Judge Nealon relieved Rooney and Burke of liability. [Statement of the Case at p. 7]. In a January 21, 2000 order, the District Court denied the "attorney defendants' " (Rooney's and Burke's) motion for summary judgment and directed further briefing on the issue of whether summary judgment should be granted on their liability to plaintiff under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). [F-1, F-37]. The District Court concluded that Rooney and Burke were "federal agents" under the "test of state action" applied in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1993). [E-10]. In making this finding, the District Court rejected Rooney and Burke's argument that they were not federal actors because the *independent* exercise of discretion by Judge Nealon distinguished Egervary's case from *Jordan*, where the attorneys simply invoked a constitutionally-flawed confession of judgment procedure on behalf of their clients and it was issued by the ministerial act of the prothonotary. As the District Court acknowledged in explaining the decision in *Jordan*, the attorney defendants obtained judgment under that procedure from the prothonotary by presenting nothing more than a complaint, "'an instrument the defendant has signed authorizing judgment by confession and an actual confession of judgment signed by any attorney acting for the defendant.'" [E-7 n.4 quoting *Jordan*, 20 F.3d at 1262]. Notwithstanding Rooney

and Burke's arguments that the independent, discretionary act of Judge Nealon meant they could not be considered federal actors in obtaining and executing the judge's order, the District Court considered there was a "close analogy" between the *Jordan* private attorneys' obtaining judgment under this procedure and then setting execution of judgment "in motion" and Rooney and Burke's conduct in this case. [E-8 – E-9].[3]

2. The Court of Appeals decision and issues raised by Respondents.

Respondents Rooney and Burke also urged the Court of Appeals to accept that the District Court had erred when it ignored the fundamental difference between the independent exercise of discretion by Judge Nealon involved in this case, where private attorneys presented a petition under a constitutionally-valid treaty and asked for alternative relief, and the flawed procedure invoked by the attorney-defendants in *Jordan*. [Rooney and Burke's C.A. brief, p. 36].

Rooney and Burke also asked the Third Circuit to consider that the Supreme Court had never extended *Bivens* liability to private actors, and that it had cautioned, in *dictum*—in a decision decided after the District Court had found Rooney and Burke were "federal actors,"—that the Court had "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). [Rooney and Burke's C.A. brief at pp. 42-46]. They also argued that if they *were* held to be federal agents under *Bivens*, they were

3. However, the Court declined to enter summary judgment against these attorney defendants on the *Bivens* claims, deciding they would be entitled to assert a good faith defense at trial. [E-7 – E-10].

entitled not just to a good faith defense, but as attorneys offering their services to the government in fulfilling their obligations under the Hague Convention, to some version of immunity. [C.A. Brief at pp. 47-50]. Rooney and Burke argued that while the Supreme Court had foreclosed the availability of qualified immunity in the context of state replevin, garnishment or attachment statutes, *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992), the Court had left open the possibility that the defense was available to these private attorneys, stating that it had previously answered the immunity question "narrowly, in the context in which it arose." *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (denying immunity to private prison guards, "subject to ordinary competitive pressures" but not foreclosing immunity for "a private individual briefly associated with a government body . . . or acting under close official supervision."). Rooney and Burke also asked the Court of Appeals to consider, in connection with the grant of immunity to them in this context, that in *Richardson* this Court noted that the law had historically provided "for a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." 521 U.S. at 407.

Rooney and Burke raised other issues concerning the failure of Egervary's proof which the Court of Appeals concluded it did not need to reach. Instead, the Court of Appeals held that Egervary had failed to establish a fundamental element of his *Bivens* claim of "proximate cause with respect to any defendant" based on the lack of any evidence that Respondents factually misled the court and the judge's independent exercise of discretion in applying the law. [A-14]. The Third Circuit also observed, without reaching the issue, that Judge Nealon testified that he believed Mr. Rooney (who drafted the petition and presented it) "acted in good faith and did not purposely mislead him." [A-20 n.6].

REASONS FOR DENYING THE PETITION

A. The writ should be denied since the Court of Appeals did not consider the issue of immunity, let alone "extend absolute immunity" to defendants, nor did it depart from established precedent in deciding that Mr. Egervary had failed to establish a *Bivens* claim.

Mr. Egervary has not presented a valid, let alone a compelling reason for this Court to grant his petition. Sup. Ct. Rule 10. While he asks this Court to review a decision of the Court of Appeals that purportedly "extended absolute immunity from damages liability to federal officers" under certain circumstances, his characterization is plainly inconsistent with that decision. The Court of Appeals explicitly declined to reach the issues of absolute immunity, qualified immunity or good faith to resolve Egervary's appeal and devoted no discussion to them. [A-14].[4] Therefore, although petitioner has suggested otherwise, the Third Circuit could not have "ignored" any well-established principle of immunity in its decision, nor could it have engaged in any "freewheeling expansion of absolute immunity" in deciding that the attorney defendants were entitled to summary judgment on the *Bivens* claims. [Petition at 8]. This Court should decline to grant this petition since the issues of immunity, while raised by defendants, were not addressed by the Court of Appeals and this issue did not directly or indirectly inform any of the reasoning of that court. *Meyer v. Holley*, 537 U.S. 280, 292 (2003) (Where the Court

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4. Although the Court of Appeals observed that District Judge Nealon believed Rooney (who alone presented the subject petition to the District Court) "acted in good faith and did not purposely mislead" Judge Nealon. [A-20 n.6].

of Appeals has not considered a matter, "we shall not consider it".), citing *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 213 (1998); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

And although Mr. Egervary argues otherwise, the Court of Appeals did not announce any novel legal principle nor did it "disregard fundamental precedent" in its decision. The circumstances in this case were accurately recounted by the Court and were not challenged by Egervary. Those facts demonstrated that defendant Rooney[5] presented a petition to a federal judge, that the petition and presentation included appropriate, accurate and non-misleading facts, that they were presented in connection with a valid procedure, and that the judge erred in applying the law to those facts when choosing among alternative relief requested by counsel. The Court of Appeals appropriately distinguished this circumstance—involving an error of the court in applying the law—from the circumstance in which a judicial officer "applies the correct governing law and procedures, but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts" by counsel. [A-23]. In reaching this conclusion, the Court of Appeals recognized and did not depart from the "well settled principle" that when a misrepresentation or omission of fact has occurred, "the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions." *Id.* However, that was plainly not the circumstances of the petition presented to Judge Nealon. Therefore, the Third Circuit correctly concluded that these private attorney defendants could not be held liable under *Bivens* for the independent exercise of discretion by Judge Nealon in applying the law.

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5. Defendant Burke did not participate in the presentation to Judge Nealon. [A-5 – A-8].

B. The Third Circuit's decision is consistent with decisions involving "unconstitutional warrants prepared and submitted by the actors for approval" – the attorney defendants did not omit or misrepresent facts and the district judge plainly exercised his discretion in applying the law and selecting among the remedies presented.

Petitioner argues that the Court of Appeals decision directly conflicts with a "pronouncement" in *dictum* in *Malley v. Briggs*, 475 U.S. 335 n.7 (1986), recently "confirmed" in *Groh v. Ramirez*, 540 U.S. 551 n.4, 124 S. Ct. 1284 (2004). [Petition at p. 7]. The Third Circuit's decision is consistent with *Groh* and *Malley*. This Court counseled, in a footnote in *Malley*, that 42 U.S.C. § 1983 should be read against the "background of tort liability" which recognizes a causal link—in a malicious prosecution claim—between the submission of a complaint and the resulting arrest. 540 U.S. 551 at n.7. The Third Circuit's analysis began with the assumption that *Bivens* actions are "simply the federal counterpart to § 1983 claims"[6] and as the footnote in *Malley* counseled, the Third Circuit looked to traditional tort concepts of causation for guidance and applied them to this *Bivens* claim. [A-14]. The Third Circuit considered that the "causal link" that is sufficient to impose liability in a

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6. An assumption that this Court has observed may not be warranted with respect to the extension of such claims to "any new context or new category of defendants." *Correctional Services, Corp. v. Malesko*, 534 U.S. 61, 68, 67-70 (2001); *Sosa v. Alvarez-Machain*, ___ U.S. ___, 124 S. Ct. 2739, 2772 (2004) (Scalia, Concurring) . Compare *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (§ 1983 can "sometimes impose liability on a private individual"). To date, this Court has not decided whether a *Bivens* action might lie against a private individual.

malicious prosecution claim is misdirection, either by omission or commission, in the facts supporting the warrant or indictment that is "put before an impartial intermediary such as a magistrate or grand jury." [A-17, A-18]. On the other hand, where there is no factual misdirection, as in this case, the chain of causation may be broken by the "intervention of independent judicial review." [A-23]. So long as the judge has been presented with all the facts, and his or her decision is not tainted by some factual misdirection, the traditional tort concepts of independent, intervening cause will relieve the complainant from liability for a constitutional tort. [A-18]. The Third Circuit thus held:

> Where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability.

[A-23].

Although Egervary suggests otherwise, there is no conflict between the Third Circuit's analysis of causation and this Court's decision in *Groh*. That decision involved a *Bivens* claim based on a search undertaken pursuant to a warrant which lacked particularity, a failing apparently resulting from a clerical error attributable to the ATF agent presenting the warrant. Far from imposing absolute liability on officials for executing an invalid search warrant, the Court looked to the factual representations made to the federal magistrate on the face of the warrant and the responsibility of the officials for these representations. The Court observed that the *Fourth Amendment*'s warrant requirement "interposed a magistrate between the citizen and the police" so that an "objective mind might weigh the need to invade" a citizen's privacy. 540 U.S. at __, 124 S. Ct. at 1291.

The magistrate's decision to approve the warrant would not exempt the search from the presumption that it was unreasonable, not because the Court discounted the exercise of *independent judgment* of the magistrate, but because of the incorrect description supplied in the warrant submitted for approval. Because of that factual error of description on the face of the warrant, there was no way to know whether the magistrate had *independently* "agreed that the scope of the search should be as broad as the affiant's request" in the accompanying application (supported by the agent's affidavit). *Id.* at 1292. Thus, since the restraints on the search could only be said to have been "'imposed by the agents themselves, not by a judicial officer,'" the search not only violated the *Fourth Amendment*, it made the ATF agents who were responsible—who caused a flawed warrant to be used for the search—liable for that unconstitutional search. *Id.* (citation omitted). So long as the actor was responsible for the factual error or misdirection, it will not be "reasonable for the petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at n.4.

Thus, *Groh* applied the same principle found in the various decisions relied upon by the Third Circuit that a § 1983 or *Bivens* claim would only be established where some active or passive factual misdirection by a state or federal actor to a judicial officer was involved, and where it resulted in a constitutional violation.[7] A different set of circumstances, *Groh* plainly suggests, in which the defect in the warrant was purely the result of the magistrate's

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7. This Court also concluded that an immunity defense was unavailable to the petitioner in *Groh* because he had prepared the invalid warrant himself. Under those circumstances he could, therefore, not have reasonably relied on any assurance from the magistrate that the "warrant contained an adequate description of the things to be seized and was therefore valid." 124 S. Ct. at 1293.

incorrect application of law to an accurate and complete set of facts, would necessarily lead to the analysis employed by the Third Circuit in Egervary's case and the finding of a break in causation. Therefore, neither *Malley* nor *Groh* nor any other decision cited by Egervary provides a valid reason for this Court to grant his petition based on a conflict with either decision. Nor did the Third Circuit's decision depart from established precedent in concluding that the conduct of these attorney defendants in presenting their petition to Judge Nealon was not the cause of Egervary's harm.

C. Mr. Egervary was not left without a remedy in the underlying case and implying a *Bivens* action in this context will serve no policy of deterrence.

As the Third Circuit also correctly noted, Mr. Egervary elected to participate in the custody proceeding in Hungary, already underway before this seizure occurred,[8] rather than to continue to pursue the post-seizure remedy he had started in this case of asking the District Court to reconsider the *ex parte* order. Had the District Court, in response to that motion, corrected its error and reversed its order he would have had the opportunity—as the Third Circuit suggests—to enlist the State Department in the return of young Oscar. [A-25]. Although these attorney defendants had argued to the Third Circuit that this course of action of pursuit of custody in Hungary and abandonment of a remedy in the District Court amounted to waiver of a *Bivens* claim, they also suggest something else: that there is no need to infer a *Bivens* claim "because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 534 U.S. at 67-68.

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8. Mr. Egervary testified that he did not receive notice of this proceeding until after Oscar J. was returned to his mother in Hungary.

Egervary also insists that the supposed grant of "absolute immunity" by the Third Circuit to these attorney defendants will produce a number of dire consequences, including "incit[ing] abuse of authority as well as irresponsible lawyering." [Petition at 14]. As should be plain from its opinion, the Third Circuit did not grant any kind of immunity to these defendants and its ruling does not have the effect of relieving federal actors from responsibility for their conduct. Instead, the Third Circuit simply distinguished between the appropriate roles and responsibilities of judicial officers and attorneys; the former already immune for their actions, the latter continuing, consistent with established precedent, to be held fully responsible for any omission or commission of fact in their presentations to a judicial officer in this context.

Moreover, members of the bar have long been deterred from misconduct by the very real prospect of enforcement of professional rules, as this Court noted in *Malley* with respect to prosecutors. *Malley*, 475 U.S. at 343 n.5. The "organized bar's development of professional standards," *id*, that are enforceable against prosecutors apply equally to these attorney defendants and certainly lessen the potential for the abuses suggested by Egervary. *See, e.g., Office of Disciplinary Counsel v. Holston*, 533 Pa. 78, 82, 619 A.2d 1054 (1993) (upholding disciplinary board's sanction of disbarment for violation of Pa. R.P.C. 3.3(a)(1).

CONCLUSION

For the reasons stated in this response, and for the additional reasons explained by the Court of Appeals, Respondents Rooney and Burke respectfully request that this Court decline to grant the petition for writ of certiorari. Alternatively, should the Court conclude that the writ should be granted, Respondents request that this Court affirm on the ground that, as a matter of law, the undisputed facts demonstrate that these attorneys acted in good faith in the proceedings before Judge Nealon.

Respectfully submitted,

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